

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

MARVIN McELROY,

Plaintiff,

No. CIV S-04-0498 FCD DAD P

vs.

E. EDELHOFER, et al.,

Defendants.

ORDER

Plaintiff, a state prisoner proceeding pro se, has requested voluntary dismissal of this action pursuant to Federal Rule of Civil Procedure 41(a)(1)(i). Defendant Edelhofer has filed a statement of non-opposition to dismissal of the action.¹

Pursuant to Rule 41(a)(1)(i), a plaintiff may dismiss an action without order of court by filing a notice of dismissal at any time before the adverse party serves an answer or a motion for summary judgment. Plaintiff may not dismiss his action pursuant to Rule 41(a)(1)(i) because defendant Edelhofer served an answer on August 6, 2004. Good cause appearing, the court will construe plaintiff's filing as a request for voluntary dismissal of the action without prejudice pursuant to Rule 41(a)(2). So construed, the unopposed request will be granted.

¹ Plaintiff's claims against defendants Smith and Drew were dismissed without prejudice on February 10, 2005.

Accordingly, IT IS HEREBY ORDERED that:

1. Plaintiff's August 22, 2005 motion for voluntary dismissal is granted;
2. This action is dismissed without prejudice pursuant to Rule 41(a)(2); and
3. The Clerk of the Court shall close this case.

DATED: August 25, 2005.



DALE A. DROZD
UNITED STATES MAGISTRATE JUDGE

DAD:13:kf
mcel0498.59